

No. 83-249

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In The  
**Supreme Court of the United States**  
October Term, 1983

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WILMA EVERITT, ET AL.,

*Petitioners,*

VS.

THE CITY OF MARSHALL, TEXAS, ET AL.,

*Respondents.*

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On Petition For Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

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**RESPONDENTS' BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in denying class certification?
2. Does the holding of the Fifth Circuit Court of Appeals conflict with the ruling in *United States Parole Commission v. Geraghty*, 445 U.S. 388, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980).

## LIST OF PARTIES

1. Wilma Everitt, Petitioner;
2. All black past, present and future employees of The City of Marshall, Texas, potential class members;
3. The City of Marshall, Texas, Respondent;
4. William Burns, Respondent;
5. Pete McCarty, Respondent;
6. Ray Jackson, Respondent;
7. S. A. Birmingham, Respondent;
8. Wayne Courtney, Respondent;
9. Glenn Listen, Respondent;
10. Cecil Wallace, Respondent.

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**RESPONDENTS' BRIEF IN OPPOSITION**

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TO THE HONORABLE SUPREME COURT  
OF THE UNITED STATES:

The Respondents, The City of Marshall, et al., respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

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## **CITATIONS TO OPINIONS BELOW**

Petitioner accurately states the status of the opinions below in her Petition for Writ of Certiorari.

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## **JURISDICTION**

Petitioner accurately states her allegations of jurisdiction with the exception that the citation to the appropriate statute is in error apparently due to a typographical mistake and states jurisdiction is evoked under 21 U. S. C. Section 1254 when in fact the citation should be 28 U. S. C. Section 1254. Respondent denies that this Court has jurisdiction.

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## **CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS**

References to the appropriate legal precedents are correctly stated in Petitioner's Petition for Writ of Certiorari with the exception of an omission of a reference to Rules 17 through 23 of the U. S. Supreme Court Rules, set forth in full in Appendix A to this Brief.

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## **STATEMENT OF THE CASE**

Petitioner's statement of the case in her Petition for Writ of Certiorari is substantially correct.

## SUMMARY OF ARGUMENT

1. This Court has no jurisdiction to consider the Petition for Writ of Certiorari since it was not timely filed.

2. There are no circumstances creating a need for a review by this Court of the lower court's use of its discretion and in fact such Court did not abuse its discretion in denying class certification.

3. The decision of the Fifth Circuit Court of Appeals relating to whether or not Petitioner is a proper class representative does not conflict with the ruling in *United States Parole Commission v. Geraghty, id.*, which deals with a jurisdictional question.

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## ARGUMENT

### Petition Is Not Timely Filed

A Petition for Writ of Certiorari to review the judgment of a Federal Court of Appeals must be filed within sixty (60) days after entry of such judgment. Rule 20(1), U. S. Supreme Court Rules. It is clear that the time for filing a Petition for Writ of Certiorari runs from the date the judgment or decree is rendered. Rule 20(4), U. S. Supreme Court Rules. The Clerk of the Supreme Court is required to refuse to receive any Petition for Writ of Certiorari which is filed in an untimely manner. Rule 20(3), U. S. Supreme Court Rules. The judgment sought to be reviewed by Petitioner herein of the United States Court of Appeals, Fifth Circuit, was rendered on April

22, 1983. Petition for Writ of Certiorari was filed with the Clerk of the United States Supreme Court by Petitioner's attorneys on July 21, 1983. Therefore, the Petition was filed more than sixty (60) days after the judgment was rendered and is not timely. As a result this Court has no jurisdiction pursuant to its own rules to consider the Petition.

### **No Need For Review**

Ordinarily, the application by a Federal District Court of the Rules of Civil Procedure, when affirmed by a Court of Appeals, will not be reviewed by the Supreme Court on Certiorari. This is particularly true when the question is one that concerns the judgment of a District Judge in relation to a particular set of facts. *Appalachian Power Company v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959). There are no extraordinary circumstances which would give rise to the need of review by the Supreme Court in this matter. The Trial Court considered the testimony and documentary evidence tendered by both Petitioner and Respondents and determined the evidence proffered by Respondents was more credible. The Fifth Circuit Court of Appeals reviewed that evidence and upheld the decision of the Trial Court. There was clear, convincing and credible evidence to support the findings of the Trial Court and no unusual circumstances giving rise to extraordinary review by this Court.

### **No Conflict**

Petitioner urges the Court in her Petition for Writ of Certiorari that the instant case conflicts with the holding of *United States Parole Commission v. Geraghty*, *id.* The *Geraghty* decision is not on point with the ruling in this case. *Geraghty* deals with questions of jurisdiction



and standing to appeal the denial of class certification under Article III of the United States Constitution. There is no jurisdictional or standing question involved in this action but merely a question of whether Petitioner constitutes a proper class representative. The Supreme Court held in *Geraghty*:

"Our holding is limited to the appeal of the denial of class certification motion. A named Plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. (Citations omitted). If, on appeal it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.

Our conclusion that the controversy here is not moot does not automatically establish that the named Plaintiff is entitled to continue litigating the interests of the class. It does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interest of the class'. (Citations omitted). We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue."

The question of who is to represent a class is not a question of whether a case or controversy exists under the Constitution. It is a matter of the application of the Federal Rules of Civil Procedure to the factual circumstances existing. The applicable rule is derived from *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977). In *Rodriguez, supra*, the putative class was not certified and at trial the named representative lost his individual claim. While on appeal the Court of Appeals certified the class. This class certification at the appellate level is the only factual distinction from the case at hand. The Supreme Court reversed the decision "for the simple reason that it was evident by the time the case reached (the Court of

Appeals) that the named Plaintiffs were not proper class representatives under Federal Rule of Civil Procedure 23(a)," because they "were not members of the class of discriminatees they purported to represent." It is apparent in this case that Petitioner is not a proper class representative because she was determined to lack any injury in common with the putative class members. Her lack of nexus with or membership in the putative class is fatal to her claim of representation.

Petitioner complains of that portion of the Court of Appeals ruling in the present instance relating to a determination that Petitioner is not a proper class representative. She claims certiorari is proper due to an alleged conflict with the ruling of this Court in the *Geraghty* decision relating to a question of the existence of a case of controversy under Article III of the United States Constitution. The two cases are unrelated and therefore cannot be in conflict.

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### CONCLUSION

The Court of Appeals action in affirming the denial of class certification was proper. The Petition for Writ of Certiorari filed by Petitioner was not timely filed and therefore this Court is without jurisdiction to review the matter. Further, there are no circumstances giving rise to a review by this Court of the ruling of the Court of Appeals.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## **APPENDIX "A"**

### **PART V. JURISDICTION ON WRIT OF CERTIORARI**

#### **Rule 17. Considerations governing review on certiorari.**

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

**Rule 18. Certiorari to a federal court of appeals before judgment.**

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U. S. C. § 2101(e); see also, *United States v. Bankers Trust Co.*, [55 S. Ct. 407] 294 U. S. 240 [79 L. Ed. 885] (1935); *Railroad Retirement Board v. Alton R. Co.*, [55 S. Ct. 758] 295 U. S. 330 [79 L. Ed. 1468] (1935); *Rickert Rice Mills v. Fontenot*, [56 S. Ct. 374] 297 U. S. 110 [80 L. Ed. 513] (1936); *Carter v. Carter Coal Co.*, [56 S. Ct. 855] 298 U. S. 238 [80 L. Ed. 1160] (1936); *Ex parte Quirin*, [63 S. Ct. 1] 317 U. S. 1 [87 L. Ed. 3] (1942); *United States v. Mine Workers*, [67 S. Ct. 677] 330 U. S. 259 (1947); *Youngstown Sheet & Tube Co. v. Sawyer*, [72 S. Ct. 863] 343 U. S. 579 [96 L. Ed. 1153] (1952); *Wilson v. Girard*, [77 S. Ct. 1409] 354 U. S. 524 [1 L. Ed. 2d 1544] (1957); *United States v. Nixon*, [94 S. Ct. 3090] 418 U. S. 683 [41 L. Ed. 2d 1039] (1974).

Rule 19. Review on certiorari-how sought-parties.

.1 A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

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.2 When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record, or stipulated portions thereof, has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests. The provisions of Rule 13.3 with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

.3 Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4 Parties interested jointly, severally, or otherwise in a judgment may join in a petition for writ of certiorari therefrom; or any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

.5 Not more than 30 days after receipt of the petition for certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with Rule 21. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 20.5. It shall be the duty of counsel for the cross-petitioner to

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notify the cross-respondent on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-petition. Such notice shall be served as required by Rule 28. A cross-petition for certiorari may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-petition may not be extended.

.6 All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party hereby notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

### Rule 20. Review on certiorari-time for petitioning.

.1 A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2 A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U. S. C. § 2101 (c).

.3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5 A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6 An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (See Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

**Rule 21. The petition for certiorari.**

.1 The petition for writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the

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questions set forth in the petition or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote. See Rule 29.1.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinion delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed;

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1(k) of this Rule.



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(g) A concise statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

(i) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

(k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case,

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and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree or order on rehearing.

(iv) Any other appended materials.

If what is required by this paragraph or by subparagraphs 1(f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

.2 The petition for writ of certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3 All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph 1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4 The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendix.

.5 The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready

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and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition.

As amended Oct. 21, 1980, eff. Nov. 21, 1980.

Rule 22. Brief in opposition-reply-supplemental briefs.

.1 Respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 29.4) after receipt of a petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. See Rule 17. Such brief in opposition shall comply with Rule 33 and with the requirements of Rule 34 governing a respondent's brief, and shall be served as prescribed by Rule 28. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.2 A brief in opposition shall be as short as possible and may not, in any single case, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1(f), and any appendix. See Rule 28.1.

.3 No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant the writ of certiorari may be included in the brief in opposition.

.4 Upon the filing of a brief in opposition, or the expiration of the time allowed therefor, or express waiver of the right to file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for certiorari has been filed, distribution of both it and the petition for certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5 A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner

but distribution under paragraph .4 hereof will not be delayed pending the filing of any such brief. Such brief shall be as short as possible, but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6 Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed. As amended Oct. 21, 1980, eff. Nov. 21, 1980.

**Rule 23. Disposition of petition for certiorari.**

.1 After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2 Whenever a petition for writ of certiorari to review a decision of any court is granted, an order to that effect shall be entered, and the Clerk forthwith shall notify the court below and counsel of record. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3 Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.